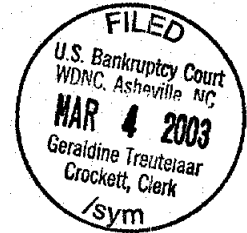


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA



In Re:)

MARK A. COOK and)
CHRISTINA R. COOK)

Debtors.)

Case No.02-11321

Chapter 7

JUDGMENT ENTERED ON MAR - 4 2003

ORDER OVERRULING OBJECTION TO EXEMPTION

This matter is before the court on the Trustee's objection to debtors' claim of exemption for prepaid rent for a leasehold interest in their residence. The court has concluded that the Trustee's Objection should be overruled and that the debtors are entitled to an exemption pursuant to N.C. Gen. Stat. § 1C-1601(a)(1) for the following reasons:

1. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(B) and the court has jurisdiction under 28 U.S.C. § 1334.

2. The debtors, Mark A. Cook and Christina R. Cook filed with this court a voluntary petition under Chapter 7 of the bankruptcy code on November 27, 2002.

3. Prior to the filing of such petition, debtors owned a 1/4 interest in real property located at 902 Chestnut Mountain Road in Canton, NC. That interest was transferred to the male debtor's brother in consideration for the debtors receiving a

24-month "prepaid lease arrangement" on the premises. Upon consummation of such agreement, the debtors moved their family into the home at 902 Chestnut Mountain Road, Canton, North Carolina and they continue to reside there at the present time.

4. When the debtors filed their petition they claimed a property exemption for Chestnut Mountain Road property and indicated their interest to be a 24-month prepaid leasehold. The debtors value this interest to be equal to the 1/4 interest transferred less the amount of the mortgage debt.

5. On February 5, 2003, the Trustee timely filed an Objection to Exemption. The Trustee asserts that, under North Carolina law, a residential exemption is conditioned upon continued use of the property as the debtor's residence and continued ownership of the property in fee simple.

6. The sole issue before this court at this time is whether the Debtors are entitled to claim an exemption for their prepaid leasehold interest under the North Carolina homestead exemption.

7. North Carolina has opted out of the exemptions provided in § 522(d) of the bankruptcy code, therefore North Carolina law determines which exemptions are available to debtors in this state. N.C. Gen. Stat. § 1C-1601(a)(1) provides that "Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of creditors (1)

the debtor's aggregate interest, not to exceed ten thousand dollars (\$10,000) in value, in real property or personal property that the debtor...uses as a residence...."

8. There are two requirements for property to qualify for an exemption under the North Carolina exemption statute. First, the debtor must use the property as a residence and second, the property "must be property in which the debtor owns an interest." *In re Parrish*, 2002 WL 31474172 (Bankr. M.D.N.C. 2002) (Stocks, J.); *In re Cain*, 235 B.R. 812 (Bankr. M.D.N.C. 1998) (Stocks, J.). "There is no limitation or restriction in the statute regarding the nature or extent of the interest which must be owned." *In re Cain*, 235 B.R. at 816. Here, the debtors own a leasehold interest in the real property. A leasehold is an estate in land where the tenant has a present possessory interest in the leased property. Thus, the debtor's prepaid lease of the property at issue satisfies the ownership of an interest in real property requirement of the North Carolina statute.¹ As to the use requirement, there is no question that the debtors currently use the property as their residence.


1. The court does not believe this decision is inconsistent with *In re Love*, 42 B.R. 317 (Bankr. E.D.N.C.1984) (Small, J.) That case relies on *Stokes v. Smith*, 246 N.C. 694, 100 S.E.2d 85 (1957) which held the homestead exemption was unavailable to a debtor who "voluntarily parts with his legal title and the right to use, occupy, and enjoy" the land. *Id.* at 703, 100 S.E.2d at 92. Conversely; stated in the positive, the homestead exemption applies where the debtor retains legal title or the right to use, occupy and enjoy the land (such as a lease).

9. The North Carolina Supreme Court has stated that exemption laws should be liberally construed: "exemptions, being remedial in their nature and founded upon sound public policy should always receive a liberal construction so as to embrace all person coming fairly with the statute." *Elmwood v. Elmwood*, 29 N.C. 168, 185, 244 S.E.2d 668, 678 (1978).

10. The language of the North Carolina homestead exemption statute suggests that its purpose is to secure debtors and their families the shelter of a homestead. The statute uses the term "interest", which is broader than "fee simple title." Therefore, based on the plain language of the statute and following the sound opinions issued by Judge Stocks in *In re Cain* and *In re Parrish*, the court finds that that the Trustee has failed to carry the burden of proof as the objecting party; that the debtors have satisfied the requirements of N.C. Gen. Stat. § 1(c)-1601(a)(1); that the Objection to Exemption should be overruled; and that the exemptions as claimed by the debtors should be upheld.

It is therefore **ORDERED** that:

1. The Objection to Exemption is overruled, and
2. The exemptions as claimed by the debtors are upheld.



George R. Hodges
United States Bankruptcy Judge